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No. 06-341

IN THE

Supreme Court of the United States

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Courts of Appeals for the Tenth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 6

I. A CLEAR RULE WHEN A SUBORDINATE'S BIAS MAY BE IMPUTED TO THE EMPLOYER IS CRUCIAL IN TITLE VII DISCRIMINATION CASES, UNDER EITHER SHIFTING-BURDENS OR MIXED-MOTIVES FRAMEWORK. 6

II. AGENCY THEORY SUPPORTS IMPUTING LIABILITY WHERE THE BIASED EMPLOYEE WAS THE CAUSE OF THE TERMINATION WITHOUT ANY INTERVENING SUPERSEDING CAUSE. 10

A. The Biased Supervisor Was Acting Within the Scope of Employment 11

B. The Employer's Investigation is Not a Superseding Cause Sufficient to Break the Causal Chain. 14

III. TITLE VII REQUIRES THE EXHAUSTION OF ADMINISTRATIVE REMEDIES PRIOR TO SUIT. 18

IV. CORPORATE EMPLOYMENT POLICIES ARE NOT A SUBSTITUTE FOR THE ADMINISTRATIVE PROCESS OR JUDICIAL ENFORCEMENT OF TITLE VII 19

A. Employers Have a Strong Incentive to Implement Anti-Discrimination Policies. 23

B. A Title VII Plaintiff is Not Required to Complain About Discrimination to Corporate Human Resources. 25

V. THE ALLEGED BURDEN ON EMPLOYERS IS VASTLY OVERSTATED. 26

A. The Defendant Preserves All Defenses Regardless of Imputed Liability 26

B. An Adequate Investigation Must Determine the Truth of the Allegations and That They Are Not Pretextual 28

C. An Adequate Investigation Does Not Impose An Undue Burden On Employers 29

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Barnes v. St. Catherine's Hospital, 563 F.2d 324 (7th Cir. 1977).....25

Brown v. General Services Administration, 425 U.S. 820 (1976).....18

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).....14, 23, 25, 29

Cadena v. Pacesetter Corp., 224 F.3d 1203 (10th Cir. 2000).....24

Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).....9

E.E.O.C. v. AIC Security Investigations, Ltd., 55 F.3d 1276 (7th Cir. 1995) 10

Equal Employment Opportunity Commission v. BCI Coca-Cola Bottling Company of Los Angeles, 450 F.3d 476 (10th Cir. 2006) 6

Equal Employment Opportunity Commission v. Warfield-Rohr Casket Co., Inc., 364 F.3d 160 (4th Cir. 2004).....8

Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830 (1996).....16

Faragher v. Boca Raton, 524 U.S. 775 (1998) 1, 11, 13, 14

Farr v. NC Machinery Co., 186 F.3d 1165 (9th Cir. 1999).....16

Gary v. Long, 59 F.3d 1391, 1399 (D.C. Cir.), *cert. denied*, 516 U.S. 1011 (1995).....10

Grant v. Lone Star Co., 21 F.3d 649 (5th Cir. 1994) 10

Griffith v. City of Des Moines, 387 F.3d 733 (8th Cir. 2004) 9

Hillstrom v. Best Western TLC Hotel, 354 F.3d 27 (1st Cir. 2003) 8

Holly D. v. California Institute of Technology, 339 F.3d 1158 (9th Cir. 2003) 23

Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999) 12, 24

Kotcher v. Rosa & Sullivan Appliance Center, Inc., 957 F.2d 59 (2nd Cir. 1992) 14

Lenhardt v. Basic Institute of Tech. Inc., 55 F.3d 377 (8th Cir. 1995) 10

Lewis v. Young Men's Christian Ass'n, 208 F.3d 1303 (11th Cir. 2000) 8

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 7, 9, 27

McGinest v. GTE Service Corp., 360 F.3d 1103 (9th Cir. 2004) 9

Miller v. Maxwell's Intern. Inc., 991 F.2d 583 (9th Cir. 1993) 10

Obrey v. Johnson, 400 F.3d 691 (9th Cir. 2005) 26

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 7, 11

Rachid v. Jack in the Box, Inc., 376 F.3d 305 (5th Cir. 2004) 8

Reeves v. Sanderson Plumbing, 530 U.S. 133 (2000) 11

Sauers v. Salt Lake County, 1 F.3d 1122 (10th Cir. 1993) 10

Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990) .14

Smith v. Lomax, 45 F.3d 402 (11th Cir. 1995).....10

Springer v. Seaman, 821 F.2d 871 (1st Cir. 1987),.....15, 16

Stegall v. Citadel Broadcasting Co., 350 F.3d 1061 (9th Cir. 2003).....8

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 7

Tomka v. Seiler Corp., 66 F.3d 1295 (2d Cir. 1995).10

Vinieratos v. United States Air Force, 939 F.2d 762 (9th Cir.1991).....18

Wathen v. General Electric Co., 115 F.3d 400 (6th Cir. 1997).....10

Watson v. Southern Pennsylvania Transportation Authority, 207 F.3d 207 (3rd Cir. 2000).....8

Wright v. Murray Guard Inc., 455 F.3d 702 (6th Cir. 2006).....9

STATUTES AND REGULATIONS

42 U.S.C. § 2000e-16(c) 18

42 U.S.C. § 2000e 16(c); 18

42 U.S.C. § 2000e 2(a)(1).....7

42 U.S.C. § 2000e 2m 7, 9

42 U.S.C. § 2000e 5(b).....19

42 U.S.C. § 2000e 5(e)(1).....19

42 U.S.C. § 2000e 5(f)(1) 19

42 U.S.C. § 2000e 5(g)(2)(B).....8, 29

42 U.S.C. § 2000e(b).....9

42 U.S.C. § 2000e-16(c) 18

29 C.F.R. §1614.401 18

29 C.F.R. §1614.407 18

29 C.F.R. § 1614.105(a)(1).....18

29 C.F.R. § 1614.110(a) 18

OTHER AUTHORITIES

Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 Berkeley J. of Emp. and Labor Law 1 (2001) ..22

John M. Darley & Paget Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. Personality & Soc. Psychol. 20 (1983).....21

John M. Darley & Russell H. Fazio, *Expectancy Confirmation Processes Arising in the Social Interaction Sequence*, 35 Amer. Psychologist 867 (1980).....21

Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance In Sexual Harassment Law*, 26 Harv. Women's L.J. 3 (2003) 22

Einhorn J. Hillel & Robin Hogarth, *Confidence in Judgment: Persistence of the Illusion of Validity*, 85 Psychological Rev. 395 (1978) 21

Robert E. Keeton, Legal Cause In the Law of Torts (1963).....16

Charles G. Lord, Lee Ross & Mark Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. Personality & Soc. Psychol. 2098 (1979).....21

W. Prosser & W. Keeton, The Law of Torts (5th Ed. 1984) 16

Restatement of Agency (Second) § 219(1) (1958) 11

Restatement of Agency (Second) § 228 (1958),... 12, 13

Restatement of Agency (Third) § 7.07(2) (2006) 12, 13

Restatement (Second) of Torts § 431 15

Restatement (Second) of Torts § 442 ..... 15, 17

Restatement (Second) of Torts § 870 15

Restatement of Torts (Third) Apportionment of Liability § 3 (2000) 15

Mark Snyder & William B. Swann, *Hypothesis-testing Processes in Social Interaction*, 36 J. Personality & Soc. Psychol. 1202 (1978) 21

Mark Snyder, *Seek and Ye Shall Find: Testing Hypotheses About Other People*, in Social Cognition: The Ontario Symposium (E. T. Higgins, E. P. Herman, & Mark P. Zanna, eds., 1981) 22

P. C. Wason, *On the Failure to Eliminate Hypotheses in a Conceptual Task*, 12 Quarterly Rev. of Exp. Psychol. 129 (1960) 22

P.C. Wason & P.N. Johnson-Laird, The Psychology Of Reasoning: Structure and Content (1972) 22

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of American Justice (AAJ) respectfully submits this brief as *amicus curiae*.[1]

AAJ, formerly the Association of Trial Lawyers of America, is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent individual plaintiffs in civil actions. Among those plaintiffs are persons whose civil rights have been violated by employers who take adverse employment actions because of race, color, religion, sex or national origin. In AAJ's view, freedom from illegal discrimination is fundamental to the enjoyment of all opportunities offered in a free society. Illegal discrimination not only frustrates the individual's right to equal opportunity, it also prevents society from reaping the benefits of the contributions which highly qualified individuals are capable of making. AAJ has the firm conviction that diversity in the work place is essential both for the fulfillment of individual liberty, and to enable society to its true potential.

SUMMARY OF THE ARGUMENT

Restatement of Agency (Third) §2.04 (2006) provides, "An employer is subject to liability for torts committed by employees while acting within the scope of their employment." In *Faragher v. Boca Raton*, 524 U.S. 775 (1998), the Court declined to

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[1] This brief is filed with the consent of both parties. Their letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

recognize this theory of agency as a basis of imputing liability for sexual harassment, but only because it was unclear whether harassers were acting within the scope of their employment. *Id.* at 793-801. In this case, there is no question that the biased supervisor was the agent of the employer. Whether the supervisor was designated as an agent for the purpose of making personnel decisions is completely irrelevant. It further appears that he was acting within the scope of his employment. The only remaining question concerns causation. In this case, the biased supervisor initiated a process which caused an adverse employment action – but for his involvement there would have been no investigation and no adverse employment action. Applying traditional common law principles, the employer's investigation was entirely foreseeable and not an independent superseding cause sufficient to break the causal chain and defeat employer liability. Liability, if any, should be imputed to BCI for the discriminatory acts of its supervisor.

In this case, the employer's motion for summary judgment was denied. At trial the employer will be able to make all of the factual arguments that it now makes to this Court in an effort to convince a jury that race was not a motivating factor, and that even if it were, it would have still made the same decision. If BCI succeeds in that effort, it will win regardless of imputed liability.

BCI Coca-Cola argues that employers should be able to insulate themselves from liability in virtually all cases of discrimination initiated by non-decisionmakers. It would achieve that goal by establishing internal human resource policies for reporting allegations of discrimination and vesting

final decision making authority in human resource personnel. The rule of law advocated by BCI won't diminish the incidence of discrimination, but will make it virtually impossible to hold most employers accountable for the illegal discrimination in the workplace. Because Title VII does not recognize individual liability, the inability to hold the employer liable results in no liability and no accountability.

According to BCI, their "employment policies embody everything that Congress sought to accomplish in Title VII." BCI Brief, at 20. But if that were true, Congress would never have provided a judicial remedy to enforce the provisions of Title VII. If that were true, Congress would have never created the EEOC to investigate claims of illegal discrimination as a prerequisite for filing suit. If that were true, Congress would have simply required that all employers develop and implement sufficient employment polices, and employ human resources professionals who are trained in equal employment opportunity and who, according to BCI, "unquestionably harbor[] no animus." *Id.* This Court should not indulge in the fiction that corporate human resources personnel are neutral decisionmakers, unaffected by the reports and recommendations of line supervisors and managers. This Court should not allow the fox to guard the chicken coop.

BCI argues nevertheless that employees alleging illegal discrimination must first internally complain about the alleged discriminatory practice and pursue whatever remedies are made available under the employer's anti-discrimination policies. It then argues that the employer's determination that an allegation of discrimination is without merit

absolves it from liability, even if that determination proves to be wrong. According to BCI, the relevant inquiry is not whether the employer's proffered reasons were "wise, fair or correct" but whether they were "honestly believed." BCI Brief at 26. But where a federal agency or the EEOC honestly determines that a complaint of discrimination is without merit, an employee may still thereafter pursue the merits of a claim in federal district court.

Contrary to the implied assertion of BCI, Congress did not intend to give greater weight to a private employer's internal administrative determination than is given to either a federal agency acting as an employer, the EEOC or administrative law judges. Congress never intended to replace the civil justice system with the self-policing efforts of private employers. Congress never intended to require employees to either complain to their employer about discriminatory practices or exhaust corporate administrative remedies as a prerequisite for filing suit. A rule to the contrary would dramatically alter the enforcement mechanism of the statute.

The recognition of employer liability for the discriminatory acts of its agents will create a strong incentive to train managers and scrutinize their conduct to prevent discriminatory practices, thereby fulfilling the prophylactic goals of Title VII. While enlightened corporate human resource policies are to be encouraged, their utilization by employees can never be a substitute for the civil justice system.

BCI argues that the Tenth Circuit's decision requires it to conduct a complete investigation in advance of virtually every adverse employment action involving an employee who falls into a

protected classification. This, they argue, would impose an impossible burden on employers. BCI Brief at 45. Contrary to BCI's representations, even a so-called "rubber stamp" does not automatically result in employer liability. In all cases, an employee must still prove that the protected characteristic is a "motivating factor." In all cases, the employer preserves all remaining defenses and in particular may avoid liability or damages by proving that it would have made the same decision even without consideration of the protected characteristic. In all cases, the basic structure for proving a violation of Title VII remains unchanged.

In order to break the causal chain, an investigation must be an intervening superseding cause. An employer's so-called independent investigation is not a superseding cause of termination from employment, but even it were, an employer investigation must establish that the employer would have taken the same action even without the input from the biased non-decisionmaker. To satisfy this burden, the investigation must determine the truth of the allegations against the employee and establish that they are not pretextual. BCI's investigation was conspicuously deficient to establish either, and liability, if any, should be imputed to BCI.

ARGUMENT

I. A CLEAR RULE WHEN A SUBORDINATE'S BIAS MAY BE IMPUTED TO THE EMPLOYER IS CRUCIAL IN TITLE VII DISCRIMINATION CASES, UNDER EITHER SHIFTING-BURDENS OR MIXED-MOTIVES FRAMEWORK.

Stephen Peters was fired by BCI Coca-Cola Bottling Co. after an altercation with his supervisor regarding week-end work. The supervisor, Mr. Grado, allegedly harbored racial bias against black employees, including Mr. Peters. However, the decision to fire Mr. Peters for insubordination was made by Ms. Edgar, in the company's Human Resources Department, who had no discriminatory motive and acted on Mr. Grado's report of the incident.

The Tenth Circuit, addressing the question of when the discriminatory animus of a subordinate who was not the decisionmaker might be imputed to the employer, ruled:

> To prevail on a subordinate bias claim, a plaintiff must establish more than mere "influence" or "input" in the decisionmaking process. Rather, the issue is whether the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action. . . . [A]n employer can avoid [imputed] liability by conducting an independent investigation of the allegations against an employee.

Equal Employment Opportunity Commission v. BCI Coca-Cola Bottling Company of Los Angeles, 450 F.3d 476, 487-88 (10th Cir. 2006). The court found Ms. Edgar's "investigation" was "inadequate, as a matter of law, to defeat the inference that Mr. Grado's racial

bias tainted the decision." *Id.* at 492. Summary judgment was therefore inappropriate. *Id.* at 493.

AAJ suggests that well-settled agency rules and tort principles regarding superseding cause provide a clear rule in subordinate bias cases that serves the purpose of Title VII.

Title VII provides:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e 2(a)(1).

For many years there have been two well-recognized frameworks for analyzing disparate treatment discrimination cases. First is the so-called "pretext" framework with its origins in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981). The *McDonnell Douglas* evidentiary framework is a guideline using shifting burdens to assist the court in determining the existence of an illegal motive. The second framework, known as "mixed-motives," was recognized in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1983), and was later codified in the Civil Rights of Act of 1991; 42 U.S.C. § 2000e-2(m).[2]

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[2] The Civil Rights Act of 1991 did not amend the ADEA. Even though both statutes provide for a violation of the statute where an adverse action is taken "because of" the protected

The mixed-motive model does not utilize shifting burdens, but instead focuses more directly on proving that a protected characteristic was a motivating or substantial factor in the decision making process. Under a mixed-motive analysis Plaintiff does not have to prove pretext. *See Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061, 1067 (9th Cir. 2003) ("In mixed motive cases, . . . it does not make sense to ask if the employer's stated reason for terminating an employee is a pretext for retaliation, when the employer has offered more than one reason for the action that it took. Rather, the relevant inquiry in a 'mixed motive' case is distinct from that of a 'single motive' or pretext case"). If Plaintiff establishes that the illegal reason was a motivating factor, the burden then shifts to the employer to prove as an affirmative defense that it would have made the same decision even without consideration of the protected characteristic. 42 U.S.C. § 2000e 5(g)(2)(B).

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classification, a number of circuits have held that the mixed motive standard of the 1991 Act does not apply to cases under the ADEA. *See Lewis v. Young Men's Christian Ass'n*, 208 F.3d 1303, 1305 (11th Cir. 2000); *Watson v. Southern Pennsylvania Transportation Authority*, 207 F.3d 207, 215 (3rd Cir. 2000); *Equal Employment Opportunity Commission v. Warfield-Rohr Casket Co., Inc.*, 364 F.3d 160, 163 n.1 (4th Cir. 2004) ("We have previously assumed, without deciding, that direct evidence is still a prerequisite for a mixed-motive analysis in ADEA cases. [citing cases] We are not called on to decide that issue because the EEOC has presented direct evidence of discrimination."). *But see Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004) (deciding that the standards established by the Court in *Desert Palace* and by the Civil Rights Act of 1991 apply to the ADEA); *Hillstrom v. Best Western TLC Hotel*, 354 F.3d 27, 31 (1st Cir. 2003) (deciding whether "the real reason, at least in part, was age and gender discrimination").

In *Desert Palace, Inc. v. Costa,* 539 U.S. 90 (2003), this Court rejected the distinction between direct and circumstantial evidence and ruled that, to obtain a mixed-motive instruction under § 2000e 2(m), "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'" 539 U.S. at 101. Numerous lower courts have applied this same reasoning to summary judgment rulings.[3]

The Tenth Circuit decided this case using the *McDonnell Douglas* shifting-burden model. But the mixed-motive model is used by many lower courts in many cases. The Court should take care not to endorse one model at the expense of the other.

Title VII defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." 42 U.S.C. § 2000e(b). Individuals, however,

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[3] *See McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004) ("[W]hen responding to a summary judgment motion, the plaintiff is presented with a choice regarding how to establish his or her case. [Plaintiff] may proceed by using the *McDonnell Douglas* framework, or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated [the employer]"); *But see Griffith v. City of Des Moines*, 387 F.3d 733, 735 (8th Cir. 2004) ("*Desert Palace*, a decision in which the Supreme Court decided only a mixed motive jury instruction issue, is an inherently unreliable basis for district courts to begin ignoring this Circuit's controlling summary judgment precedents"); *Wright v. Murray Guard Inc.*, 455 F.3d 702, 716 (6th Cir. 2006) (Moore, J., concurring) (collecting cases).

are not liable for damages under Title VII.[4] As a consequence, if liability is not imputed to the employer, there is no liability or accountability at all.

II. AGENCY THEORY SUPPORTS IMPUTING LIABILITY WHERE THE BIASED EMPLOYEE WAS THE CAUSE OF THE TERMINATION WITHOUT ANY INTERVENING SUPERSEDING CAUSE.

According to BCI, when an employer institutes effective policies designed to root out animus among

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[4] *See Miller v. Maxwell's Intern. Inc.*, 991 F.2d 583, 587 (9th Cir. 1993) ("If Congress decided to protect small entities with limited resources from liability, it is inconceivable that Congress intended to allow civil liability to run against individual employees"); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995) ("We now hold that individual defendants with supervisory control over a plaintiff may not be held personally liable under Title VII"); *E.E.O.C. v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1282 (7th Cir. 1995) ("individuals who do not otherwise meet the statutory definition of 'employer' cannot be held liable under the ADA"); *Lenhardt v. Basic Institute of Tech. Inc.*, 55 F.3d 377, 381 (8th Cir. 1995) (supervisors and managers not subject to individual liability); *Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir.), *cert. denied*, (1995) (Title VII does not impose individual liability on supervisory employees); *Smith v. Lomax*, 45 F.3d 402, 403 (11th Cir. 1995) (employees cannot be held liable under the ADEA or Title VII); *Grant v. Lone Star Co.*, 21 F.3d 649, 653 (5th Cir. 1994) (Title VII does not permit imposition of liability upon an individual unless they meet Title VII's definition of employer); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993) (under Title VII, suits must proceed against individuals in their official capacities only; individual capacity suits are inappropriate); *Wathen v. General Electric Company*, 115 F.3d 400, 405 (6th Cir. 1997) ("an individual employee/supervisor, who does not otherwise qualify as an 'employer,' may not be held personally liable under Title VII").

non-decisionmaking subordinates, those subordinates are not the employer's agents whose discriminatory bias may be imputed to the employer. BCI Brief at 16. Thus, BCI argues, an employer is liable for the acts of non-decisionmakers only if it knew or should have known of the subordinates' discriminatory animus, and the protected trait was a determinative influence in the adverse action. BCI Brief at 29. BCI is wrong.[5]

A. The Biased Supervisor Was Acting Within the Scope of Employment.

In *Faragher v. Boca Raton*, 524 U.S. 775 (1998), the Court considered the agency theory to be applied for imputing liability to the employer in cases involving sexual harassment. In discussing the Restatement of Agency (Second) § 219(1) (1958), the Court acknowledged that a "master is subject to liability for the torts of his servants committed while acting in the scope of their employment." 524 U.S. at 793. The Court declined to apply that theory of agency, but only because it was unclear whether a harasser was acting within the scope of employment or a frolic. Listing examples, the Court clearly

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[5] BCI and its *amici* rely upon *Reeves v. Sanderson Plumbing*, 530 U.S. 133 (2000), for the proposition that Plaintiff must prove that race played a "determinative influence" in the outcome. But *Reeves* was decided under the ADEA, which was not included in the amendments to the Civil Rights Act of 1991. Moreover, this heightened showing is at odds with this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which simply required that plaintiff establish that a protected characteristic was a "substantial factor" in the decisionmaking process, even though other factors also motivated the practice. 490 U.S. at 258-59 (White, J., concurring). Justice White's opinion is controlling for cases not decided under the Civil Rights Act of 1991.

indicated that types of discrimination other than harassment were within the "scope of employment" theory. *Id.* at 793-801. Also relying upon the Restatement of Agency (Second) § 228(1) (1958), the Court in *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999) acknowledged,

> [E]ven intentional torts are within the scope of an agent's employment if the conduct is "the kind [the employee] is employed to perform," "occurs substantially within the authorized time and space limits," and "is actuated at least in part, by a purpose to serve the" employer.

Id. at 543-544. An employee who satisfies these rules is acting within the scope of employment "even if the employee engages in acts 'specifically forbidden' by the employer and uses 'forbidden means of accomplishing results.'" *Id.*[6]

The Restatement of Agency (Third) § 7.07(2) (2006) addresses when an employee is acting within the scope of employment for the purpose of vicarious liability somewhat differently:

> An employer acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct

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[6] While the Court in *Kolstad* declined to apply the Restatement rule to impute liability for punitive damages, the issue before the Court now involves only compensatory damages. Applying this rule within the context of compensatory damages would not diminish the incentive to implement anti-discrimination programs, just to the contrary. *See infra* at 22-24.

> not intended by the employee to serve any purpose of the employer.[7]

In this case, the biased supervisor was acting within the scope of employment. The employer delegated to the biased supervisor the authority to report insubordination to human resources, which is exactly what he did. The biased supervisor was the agent of the employer and at all times was acting within the employer's control. Whether the agent was specifically designated to make personnel decisions is irrelevant if the agent was acting within the scope of employment and his conduct "caused" the harm to Plaintiff. An employer is responsible for the wrongful acts of all its employees, not only those in personnel.

Like harassment, disparate treatment discrimination is a persistent problem in the workplace. As this Court has recognized,

> An employer can, in a general sense, reasonably anticipate the possibility of such conduct occurring in its workplace, and one might justify the assignment of the burden of the untoward behavior to the employer as one of the costs of doing business, to be charged to the enterprise rather than the victim. . . . developments like this occur from time to time in the law of agency.

Faragher, 524 U.S. at 798.

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[7] This section of the Restatement of Agency (Third) differs with the Restatement Second because it is phrased in more general terms. Under Restatement Second § 228(1)(c), conduct is not within the scope of employment unless "it is actuated, at least in part, by a purpose to serve" the employer. The Restatement of Agency (Third) exempts only that "conduct intended to serve no purpose of the employer." *See* Restatement of Agency (Third), Section 7.07 comment b (2006).

The Court in *Faragher* declined to impose this burden on the employer, but only because "there is no reason to suppose that Congress wished courts to ignore the traditional distinction between acts falling within the scope and acts amounting to what the older law called frolics or detours from the course of employment." *Id.* But this case does not involve harassment, and the biased supervisor was acting within the scope of employment and not acting on a frolic or detour. The discriminatory behavior of the non-decisionmaking supervisor is easily anticipated, and should be charged to BCI as one of the costs of doing business.[8]

B. The Employer's Investigation is Not a Superseding Cause Sufficient to Break the Causal Chain.

BCI argues that the employer should be liable where one link in the chain is infected by bias,

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[8] In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), this Court recognized vicarious liability where the actions of the supervisor "culminates" in tangible employment action. 524 U.S. at 765. In *Ellerth*, the Court recognized that supervisors without final decisionmaking authority would "cause" tangible employment action by officials higher in the decisionmaking process. "The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors. . . . The supervisor often must obtain the imprimatur of the enterprise, and use its internal processes." 524 U.S. at 762, *citing Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (noting that the supervisor did not fire plaintiff; rather, the Career Path Committee did, but the employer was still liable because the Committee functioned as the supervisor's 'cat's-paw'); *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, 957 F.2d 59, 62 (2nd Cir. 1992) ("From the perspective of the employee, the supervisor and the employer merge into a single entity"). As applied to non-harassment discrimination, however, all cases necessarily culminate in tangible employment action.

unless the causal chain is broken by an independent investigation. BCI Brief at 44. Whether a causal chain can be broken by a so-called independent investigation is determined by traditional principles of common law tort.

The traditional tort principles for determining when an intervening event rises to the level of a superseding cause are couched in the language of negligence, but apply to intentional torts as well. *See Springer v. Seaman*, 821 F.2d 871, 877 (1st Cir. 1987) (citing Restatement (Second) of Torts § 870 cmt. l, and § 431 cmt. d). The Restatement of Agency (Second) lists six considerations to determine the existence of a superseding cause.[9] Every one of the considerations listed in the Restatement militates against treating an employer's personnel

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[9] "The following considerations are of importance in determining whether an intervening force is a superseding cause of harm to another: (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence; (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation; c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation; (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act; (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him; (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion." Restatement (Second) of Torts § 442. The issue of superseding cause is not address in the Restatement of Torts (Third). *See* Restatement of Torts (Third) Apportionment of Liability § 3 cmt. c (2000).

investigation for discipline as a superseding intervening cause. In particular, "[t]he courts are quite generally agreed that [foreseeable] intervening causes . . . will not supersede the defendant's responsibility." W. Prosser & W. Keeton, The Law of Torts § 44, at 303 04 (5th Ed. 1984). *See also Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996) ("The doctrine of superseding cause is . . . applied where the defendant's negligence in fact substantially contributed to the plaintiff's injury, but the injury was actually brought about by a later cause of independent origin that was not foreseeable"); *Farr v. NC Machinery Co.*, 186 F.3d 1165, 1169 (9th Cir. 1999) ("the doctrine of superseding intervening cause is at bottom an expression of the requirement of foreseeability") (citing Robert E. Keeton, Legal Cause In the Law of Torts 38-41 (1963)).

In *Springer v. Seaman*, 821 F.2d 871 (1st Cir. 1987), an independent contract postal carrier alleged that the U.S. Post Office terminated his contract as the result of an investigation instigated by third parties who were racially motivated. *Id.* at 873. The district court granted the defendants' motion for summary judgment because it concluded that the third parties' actions were not the proximate cause of the Plaintiff's contract termination. The Court of Appeals reversed.

The Court of Appeals held that generally proximate causation was a question of fact for the jury. The Court concluded that "traditional tort rules determine when an intervening cause rises to the level of a superseding cause, destroying proximate causation by the primary act and thus relieving the defendant of liability." *Id.* at 877. The Court relied

upon the six factors set forth in the Restatement of Torts (Second) § 442 and concluded that the defendants "have not shown that the investigation and termination decision were sufficiently independent of the individual defendants' discriminatory actions to constitute superseding causes under the Restatement as a matter of law." *Id.* at 879.[10]

The Tenth Circuit did not apply the "scope of employment" theory of agency. It did not analyze whether BCI's investigation could be an independent superseding cause of Plaintiff's termination from employment. If it had, it could not have concluded that "an employer can avoid liability by conducting an independent investigation of the allegations against the employee." 450 F.3d at 488.

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[10] Applying the Restatement considerations to this case, a) the employer's investigation did not bring about a harm different in kind from that which would otherwise have resulted from the supervisor's conduct. The supervisor's conduct was intended to result in disciplinary action against the employee, which is exactly what happened; b) The employer's investigation and subsequent termination was absolutely normal, as opposed to extraordinary in view of the circumstances existing at the time of its operation; c) The investigation is not independent of the supervisor's conduct, but is the normal result of his report to human resources; d) The employer's investigation is not the result of a third person's act; the supervisor and the human resources representative conducting the investigation work for the same employer; e) the employer's investigation is not in and of itself wrongful and would not otherwise subject the employer to liability; and f) the supervisor was motivated by race in reporting the employee to human resources - the culpability is high.

III. TITLE VII REQUIRES THE EXHAUSTION OF ADMINISTRATIVE REMEDIES PRIOR TO SUIT.

To bring a Title VII cause of action against a federal agency in district court, an employee must first exhaust all administrative remedies. 42 U.S.C. § 2000e 16(c); *Brown v. General Services Administration*, 425 U.S. 820, 832 (1976). A plaintiff must comply with regulatory and judicially imposed exhaustion requirements, including the requirement to pursue the administrative claim "with diligence and in good faith." *Vinieratos v. United States Air Force*, 939 F.2d 762, 771 (9th Cir.1991).[11] Thereafter, an aggrieved employee may file suit in district court.[12]

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[11] The employee "must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory," 29 C.F.R. § 1614.105(a)(1). The EEO officer then conducts an investigation and comes to a conclusion. The employee can then file an appeal to the EEOC and thereafter proceed to federal court, without the obligation to present evidence to an ALJ in order to exhaust his or her administrative remedies. *See* 42 U. S. C. § 2000e-16(c); 29 C.F.R §§1614.401, 1614.407.

[12] "Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin . . . an employee or applicant for employment, if aggrieved by the final disposition of his complaint . . . may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant." 42 U.S.C. § 2000e-16(c) Even a decision by an administrative law judge is not binding upon an employee, who may appeal that decision to either the EEOC or district court. 29 C.F.R. § 1614.110(a).

A Title VII plaintiff employed in the private sector must file an administrative charge with the EEOC within 180 or 300 days of the last act of discrimination. 42 U.S.C. § 2000e 5(e)(1). If, after investigating, the EEOC finds reasonable cause to believe the charges are true, it undertakes to eliminate the disputed employment practice "by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e 5(b). If the EEOC finds no reasonable cause or if conciliation is unsuccessful, the employee must obtain a right to sue notice, and then file suit within 90 days. See 42 U.S.C. § 2000e 5(f)(1).

BCI argues that its own personnel policies and efforts at self-policing discrimination should supersede the administrative process created by Congress and that, unlike the congressionally mandated administrative process, its own administrative process would be binding on the employee. But Congress did not intend a corporate human resources policy to substitute for either the EEOC or the civil justice system.

IV. CORPORATE EMPLOYMENT POLICIES ARE NOT A SUBSTITUTE FOR THE ADMINISTRATIVE PROCESS OR JUDICIAL ENFORCEMENT OF TITLE VII.

BCI argues that it is the "model of equal employment opportunity" because it has established policies to encourage discrimination complaints and employs highly trained human resources personnel to oversee the process. According to BCI, "[t]he relevant inquiry is whether the employer has established an effective policy for reporting allegations of discrimination and has any reason to

suspect that animus infected the relevant decision. The employer is not liable if, despite its best efforts, it has no reason to believe that some other employee without decisionmaking authority has infected the employment decision with racial bias." BCI Brief at 15-16. According to BCI, "the relevant inquiry is not whether BCI's proffered reasons were 'wise, fair or correct' but whether BCI "honestly believed those reasons and acted in good faith upon those beliefs." BCI Brief at 26.

In effect, BCI argues that the determination by corporate human resources personnel should be sufficient to insulate it from liability – even if the determination of no discrimination is wrong. But as explained above, even a "no cause" finding by the EEOC is not binding, and the employee may litigate the merits of the discrimination claim de novo in federal district court. It is extraordinarily unlikely that Congress intended the judgment of corporate human resources personnel to carry greater weight than the EEOC or even Administrative Law Judges.[13]

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[13] In the world according to BCI, an employee who is dissatisfied with the employer's "independent" investigation and its determination of "no discrimination" could still file a charge of discrimination with the EEOC. In the employer's response to the EEOC, the employer would argue that the alleged discriminatory supervisor was not the final decisionmaker, and that the employer did an independent investigation sufficient to break the causal chain. If the EEOC confirmed these facts, its investigation would be concluded without ever reaching the merits of the discrimination claim. After having received a right to sue notice, the employee could then file a Complaint in district court. In a summary judgment motion, the employer would make the same arguments that were made at the administrative level, and if confirmed the

Much like a police department's internal investigation of an excessive force complaint, an employer's human resources personnel are not unbiased decisionmakers. It would be nothing less than folly to assume the neutrality of an employer's "independent" investigation, and would be even greater folly to accord its decision binding effect. Cognitive social psychology teaches that once a recommendation has been made, it will tend to function as a prior theory – a tentative hypothesis. As such, it can reasonably be expected to influence the ultimate decisionmaker's judgment in a recommendation-consistent direction, even if the employer conducts its own investigation. This tendency is known as expectancy confirmation bias. The empirical and theoretical literature on expectancy confirmation bias is vast.[14] Moreover,

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case would be dismissed with prejudice and again without ever reaching the merits. In the world according to BCI, its judgment about the merits of an employee's discrimination claim is in effect res judicata.

[14] See Charles G. Lord, Lee Ross & Mark Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. Personality & Soc. Psychol. 2098 (1979); Einhorn J. Hillel & Robin Hogarth, *Confidence in Judgment: Persistence of the Illusion of Validity*, 85 Psychological Rev. 395 (1978); Mark Snyder & William B. Swann, *Hypothesis-testing Processes in Social Interaction*, 36 J. Personality & Soc. Psychol. 1202 (1978); John M. Darley & Paget Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. Personality & Soc. Psychol. 20 (1983)(demonstrating how expectancy confirmation bias leads to the reinforcement of social stereotypes); John M. Darley & Russell H. Fazio, *Expectancy Confirmation Processes Arising in the Social Interaction Sequence*, 35 Amer. Psychologist 867 (1980)(same) Mark Snyder, *Seek and Ye Shall Find: Testing Hypotheses About Other People*, in Social Cognition: The Ontario Symposium 277 (E. T. Higgins, E. P.

many legal scholars seriously question whether employer anti-discrimination policies are effective in preventing discrimination. *E.g.* Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 Berkeley J. of Employment and Labor Law 1 (2001); Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance In Sexual Harassment Law*, 26 Harv. Women's L.J. 3 (2003).

Congress created a comprehensive administrative process which employees are required to initiate and exhaust as a prerequisite for filing suit under Title VII. BCI would have this Court require the exhaustion of corporate administrative remedies as a substitute for administrative remedies required by the EEOC, which would then insulate the employer from liability even where its decision was wrong. If any employer investigation is sufficient to break the causal chain and insulate the employer from liability, then the employer will invariably conduct whatever investigation is required to achieve that end. The employee will then be denied the opportunity to litigate the merits of his claim in district court. Congress never intended employer internal processes to replace the civil justice system.

Herman, & Mark P. Zanna, eds., 1981)(review of literature on hypothesis-confirming strategies); P.C. Wason & P.N. Johnson-Laird, The Psychology Of Reasoning: Structure and Content (1972); P. C. Wason, *On the Failure to Eliminate Hypotheses in a Conceptual Task*, 12 Quarterly Rev. of Exp. Psychol. 129 (1960).

A. Employers Have a Strong Incentive to Implement Anti-Discrimination Policies.

BCI vehemently argues that Congress intended the provisions of Title VII be prophylactic, and that employers should have an incentive to adopt and implement corporate policies to root out discrimination in the work place. Those incentives already exist, and additional incentives are not needed.

In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), the Court established a two prong affirmative defense to defeat vicarious liability: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." 524 U.S. at 765. But it is clear that "[n]o affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Id.* In only those cases which do not culminate in tangible employment action, a successful affirmative defense requires an employer to create sufficient policies and practices to prevent and correct sexually harassing behavior. *E.g., Holly D. v. California Institute of Technology*, 339 F.3d 1158, 1177 (9th Cir. 2003)(reasonable care to prevent sexual harassment where employer promulgated a written policy which defined prohibited behavior, identified contact personnel, and established procedures to investigate and resolve any claims, made policy available in several publications, and conducted periodic training on sexual harassment).

In *Kolstad v. American Dental Ass'n*, the Court established a three part inquiry to address when the evidence supports a punitive damages verdict. 527 U.S. at 530. The Court reaffirmed that the employee must demonstrate that "the respondent engaged in a discriminatory practice or practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual," but rejected the argument that the heightened standard requires that an employer's behavior be "egregious." *Kolstad*, 527 U.S. at 534 35. The Court also held that, "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where those decisions are contrary to the employer's 'good faith efforts to comply with Title VII.'" *Id.* at 545. This good faith defense to punitive damages requires that the employer adopt and implement anti-discrimination policies. *E.g. Cadena v. Pacesetter Corp.*, 224 F.3d 1203, 1210 (10th Cir. 2000) ("[T]o avail itself of *Kolstad's* good-faith compliance standard, an employer must at least adopt anti-discrimination policies[,] make a good faith effort to educate its employees about these policies, and 'make good efforts to enforce' the policy").

BCI argues that allowing liability to be premised upon a discriminatory motive of a non-decisionmaker who infects the decisionmaking process will create a disincentive for employers to maintain a centralized decisionmaking process as a preventative measure. BCI Brief at 47. To the contrary, imputing employer liability for the acts of its agents will create an even stronger incentive to train managers and scrutinize them to prevent discriminatory practices. Moreover, there is no reason to believe that employers will ignore the

strong incentives which already exist if the Court declines BCI's invitation to subordinate the EEOC administrative process and the civil justice system to corporate human resource anti-discrimination policies.

B. A Title VII Plaintiff is Not Required to Complain About Discrimination to Corporate Human Resources.

The second prong of the *Ellerth* affirmative defense generally requires a victim of harassment to complain to corporate management. *Ellerth*, 524 U.S. at 765. Harassment, however, is distinguishable from other forms of discrimination.

Victims of harassment necessarily know they are being harassed, and the expectation that they should complain seems reasonable. Employees who are subject to adverse employment actions, however, may not be aware that they are victims of illegal discrimination. Often a review of a co-worker's personnel files is required to demonstrate that an employee is being treated differently from those not within a protected classification. *E.g., Barnes v. St. Catherine's Hospital*, 563 F.2d 324, 327 (7th Cir. 1977) ("The plaintiff compiled a statistical compilation drawn from the personnel files of employees discharged by the hospital in an attempt to demonstrate that white employees were consistently given more written warnings and were permitted more infractions of the hospital rules prior to any suspension or termination against them"). Access to the personnel files of co-workers is routinely and understandably denied to employees. Access to other information exclusively in the possession of the employer may be necessary to establish a statistical disparity or pattern and

practice of discrimination. *E.g., Obrey v. Johnson*, 400 F.3d 691, 694 (9th Cir. 2005) ("In a case in which the plaintiff has alleged that his employer has engaged in a 'pattern or practice' of discrimination, "[s]tatistical data is relevant because it can be used to establish a general discriminatory pattern in an employer's hiring or promotion practices. Such a discriminatory pattern is probative of motive and can therefore create an inference of discriminatory intent with respect to the individual employment decision at issue"). Often this information is only uncovered in litigation during the process of formal discovery, and almost always over the vigorous objections of the employer. Because many employees may be unaware that their treatment is based upon a discriminatory motive or unaware how to prove it, it would be unreasonable to expect them to complain before the adverse action or "within a reasonable time thereafter."

BCI would apparently require that the employee complain about discrimination prior to the adverse action or "within a reasonable time thereafter." BCI Brief, at 17. Employees are apparently left to guess at what constitutes "a reasonable time thereafter." This issue is more than academic because in effect this requirement would create a new statute of limitations which would be dramatically shorter than anything contemplated by Congress.

V. THE ALLEGED BURDEN ON EMPLOYERS IS VASTLY OVERSTATED.

A. The Defendant Preserves All Defenses Regardless of Imputed Liability.

Defendant and *amici* in support mischaracterize the Tenth's Circuit's ruling. BCI argues that the court "held that liability attaches merely upon a showing of a causal relationship between any employee's biased conduct and an employment decision." BCI Brief at 18. The Advisory Council argues that "under Tenth Circuit's analysis, if a plaintiff alleges discrimination resulting from the bias of a subordinate, non-decionmaking employee, liability will attach unless the employer can demonstrate that it conducted an 'independent' investigation which confirmed its decision was not caused by the alleged underlying bias." Advisory Council Brief at 9-10. The Advisory Council further argues that the burden of proof shifts to the employer to refute discrimination without the necessity of Plaintiff proving pretext, and that this model would be a fundamental deviation from the principles established by this Court in *McDonnell Douglas*. *Id*. But this is incorrect.

The only issue before the Court concerns the viability of the so called innocent decisionmaker defense, and under what circumstances it applies to foreclose the employer's financial responsibility for the acts of its agents. The failure to prevail under this affirmative defense does not automatically result in employer liability and does not waive any traditional defenses otherwise available to the employer. It does not obviate the employee's obligation under *McDonnell Douglas* to prove a prima facie case and then subsequently to prove pretext. Under the mixed-motive analysis, it does not obviate the necessity to prove that a protected classification was a motivating factor.

On remand BCI will have the opportunity to persuade the jury that race was not a motivating factor or that it would have taken the same action even without consideration of race.

B. An Adequate Investigation Must Determine the Truth of the Allegations and That They Are Not Pretextual.

It should be emphasized that no investigation is adequate to break the causal chain unless it constitutes an intervening and superseding cause. The Tenth Circuit erroneously ruled, however, that in order to avoid imputed liability the employer must prove that it conducted an independent investigation which demonstrates that it would have made the same decision even without the input from the biased non-decisionmaker. The Court then ruled that "[i]ndeed, under our precedent, simply asking an employee for his version of events may defeat the inference that an employment decision was racially discriminatory." 450 F.3d at 488. Unbelievably, BCI argues that even the minimal effort of interviewing the employee would be excessive.

To achieve the intended purpose, at a minimum any employer investigation must seek to determine the truth of the allegations against the employee and that they are not pretextual. Such an investigation will require considerably more than asking the employee for his version of events. It may require interviewing witnesses identified by the employee or others and reviewing documents to determine the possible existence of disparate treatment. Often whether the employer has satisfied this burden will be a question of fact for the jury. In this case, the bare bones investigation conducted by BCI does not satisfy this standard as a matter of law.

BCI argues that setting minimum standards for investigations ignores the realities of day-to-day human resources administration, that administrators in each corporation should have discretion to determine what type of investigation is appropriate, and that courts must not be "super personnel departments." BCI Brief at 46. But this Court has already required that human resources departments exercise "reasonable care" to prevent and protect against illegal harassment. Requiring that they exercise "reasonable care" to assure the truth of the allegations against an employee and that they are not pretextual intrudes no more into the employer's personnel functions than the Court has already done in *Ellerth*.

C. An Adequate Investigation Does Not Impose An Undue Burden On Employers.

BCI argues that the requirement of some investigation to break the causal chain would result in an extraordinary burden – particularly for large employers involving all adverse actions such as raises, demotions, promotions, suspensions. Brief at 18, 45. But BCI dramatically overstates its burden.

Under this theory, if the employer seeks to preserve the so called innocent decisionmaker defense, it must prove that they would have made the same decision without the input of the biased supervisor before the adverse action becoming final. Logically, this would be an affirmative defense just like the affirmative defense to damages under Title VII. See 42 U.S.C. § 2000e 5(g)(2)(B). But even if the employer decides to rubber stamp, it can still avoid damages by proving after the adverse action that it would have made the same decision even without consideration of the protected characteristic. *Id.* In

both cases, the factual analysis remains essentially the same, only the timing differs. The issue for the employer, therefore, is not what it has to prove, but when it has to prove it.

Employer liability should be imputed where a biased non-decisionmaker acting within the scope of employment has caused an adverse employment action without any intervening and superseding cause. The minimal investigation conducted by BCI was not sufficient to break the causal chain initiated by a biased supervisor. Congress did not intend to replace the civil justice system with an employer's human resource policies.

CONCLUSION

For the above reasons, the decision of the court of appeals below should be affirmed.

Respectfully submitted,

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